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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. [redacted]370

JUAN PEREZ CAMI, MUNICIPAL COMMISSIONER OF FINANCE,

Petitioner.

—vs.—

CENTRAL VICTORIA, LTD.,

Respondent.

BRIEF FOR RESPONDENT.

FRANCIS G. CAFFEY,
Counsel for Respondent.

The Alpert Press, 116 Livingston St., Brooklyn, N. Y. Tel. Main 1058-1059

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JUAN PEREZ CAMI, MUNICIPAL COMMISSIONER OF FINANCE, Petitioner, —vs.— CENTRAL VICTORIA, LTD., Respondent.	No. 987.

BRIEF FOR RESPONDENT.

The decision of the Court of Appeals is based on lack of power in the municipality represented by petitioner to levy the tax sought to be enjoined. It does not involve a question warranting review by this Court. Moreover, it is plainly right.

I.

The description in the petition (p. 4) of the significance of the revenues affected is exaggerated. If, however, all there said were accurate, only an ordinary matter of statutory interpretation arises. That is neither grave in character nor of great public interest in the sense of the instances in which this Court allows certiorari.

See *In re Woods*, 143 U. S. 202, 206;
U. S. vs. Rimer, 220 U. S. 547;
Magnum Co. vs. Coty, 262 U. S. 159, 163.

II.

Concededly if the tax were construed to be on property (*Dawson vs. Kentucky Distilleries Co.*, 255 U. S. 288, 294), it would be invalid. Only if treated as an excise (*Patton vs. Brady*, 184 U. S. 608, 615-9), as petitioner contends it is, can there be even room for argument.

The levy is ten cents "on every hundredweight of sugar manufactured." Whether this was lawful depends solely upon the meaning of section 49 of the Municipal Law of Porto Rico (Appendix A).

Subdivision 4 of section 26 of the Municipal Law distributes to the municipal assembly power to levy taxes and excises. Section 49 defines the field to which the exercise of that power is confined. The solution of the problem therefore depends merely upon section 49.

Act No. 26 of 1914 (Appendix B) empowers a municipality to exact taxes from any person or corporation "engaged in" the business of a sugar mill. In the Municipal Law these are referred to as "license taxes." They are not so denominated in the act of 1914 itself. As will be seen later, the burden is actually laid on the total amount of business annually.

Section 49 of the Municipal Law schedules everything of which municipal revenues "shall consist." Subdivision (d) recites the taxes authorized by the act of 1914; subdivision (f), "any other impost, excise or tax."

Obviously the tax here is not embraced in subdivision (f) if it be of the kind provided for by the act of 1914. It could not be "other," within that term as employed in subdivision (f), if already included in subdivision (d).

An excise on all sugar manufactured is identical in substance and effect with a tax on the business of manufacturing sugar. Conducting the business

of manufacturing sugar is the same as engaging in the business of a sugar mill. Regarded as an excise, a tax on sugar manufactured is a tax on the process of manufacturing sugar. So also taxing the business of a sugar mill is taxing the process of manufacturing sugar—which is a constituent element of carrying on the business of a sugar mill. Accordingly, the tax imposed by the ordinance is precisely that—or is at least embraced within that—which the act of 1914 authorized.

The ordinance, however, does not conform to the limitations prescribed by the act of 1914. The statute makes "the volume of business transacted during the calendar year" the basis. It also fixes maximum rates varying with the volume. The ordinance exacts a uniform charge per hundredweight regardless of the size or money value of the business done.

In consequence, the tax in controversy cannot be sustained under either subdivision (d) or subdivision (f).

As the issue is whether the municipality had authority to levy the tax imposed by the ordinance, it is immaterial whether some other course—even though it would have been proper under the act of 1914—has or has not been followed. Failure to avail of opportunity to levy a tax under subdivision (d) cannot make subdivision (f) applicable to something to which it would not otherwise extend.

III.

It is respectfully submitted that the writ should be denied.

Dated, New York, May 16, 1924.

FRANCIS G. CAFFEY,
Counsel for Respondent.

APPENDIX A.

Section 49 of Municipal Law.

(Laws of Porto Rico of 1919, pp. 708, 712; as amended by Laws of 1920, pp. 70, 72).

"That the municipal revenues shall consist of— * * *

"(d) License taxes provided by Act No. 26 of March 28, 1914, * * * which is hereby declared to be in force; * * *

"(f) Any other impost, excise or tax that may be levied by two-thirds of the members of the municipal assembly, * * *".

APPENDIX B.

Act No. 26 of 1914.

(Laws of Porto Rico of 1914, pp. 174-7).

"Sec. 1.—That the municipal councils of all the municipalities of the Island of Porto Rico are hereby authorized to levy and collect, under the provisions of this Act, on and from every person, firm, association, partnership, corporation or other form whatsoever of commercial or industrial organization engaged in any of the businesses or industries hereinafter mentioned, the taxes hereinafter enumerated, * * *

"Sec. 2.—That the businesses or industries upon which the taxes herein provided may be levied, shall be the following: * * *

"Group C.—The businesses of sugar and molasses mills, * * *

"Sec. 3.—That all persons, firms, associations, partnerships, corporations or other form whatsoever of commercial or industrial organizations engaged in any of the businesses or industries specified in the preceding section shall pay to the treasurers of the municipalities in which said businesses or industries are situated, the tax levied by the municipal council, in accordance with this Act; said tax shall be paid, * * * on the basis of the volume of business transacted during the calendar year and immediately preceding, * * * and at the following rates; * * *

"Those of Group C:

For each $1,000 or fraction thereof in excess of the first $500 of volume of business transacted, up to $1,000,000 inclusive	$0.25 a year
For each $1,000 or fraction thereof in excess of the first $1,000,000 of volume of business transacted.....	$0.125 a year."

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WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1924

No. 370

JUAN PEREZ CAMI, MUNICIPAL COMMISSIONER OF FINANCE, PETITIONER,

—vs.—

CENTRAL VICTORIA, LTD.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1924

No. 370

JUAN PEREZ CAMI, Municipal Commissioner of Finance, Petitioner,

—vs.—

CENTRAL VICTORIA, LTD.

BRIEF FOR RESPONDENT.

This case is here on certiorari to the Court of Appeals for the First Circuit (265 U. S. 577). It involves a municipal ordinance. The District Court of Porto Rico held it invalid (R. 16-22); the Supreme Court of Porto Rico, valid (R. 24-6; 30 P. R. Rep. 413); the Court of Appeals, invalid (R. 30-1; 295 Fed. 809).

Statement.

On February 17, 1921, the Municipal Assembly of Carolina enacted an ordinance levying a tax of 10¢ on each hundredweight of sugar manufactured within its borders (R. 1-2). Respondent is a manufacturer of sugar in that municipality. Petitioner intended to collect the tax. Respondent filed its bill to enjoin him from doing so (R. 1-3). Petitioner answered admitting the material allegations (R. 7-8). The cause was submitted on the pleadings (R. 15-6). An injunction was granted (R. 21-2).

Two other municipalities adopted similar measures. That for Arroyo was passed on in *Successors of C. & J. Fantauzzi vs. Municipal Assembly of Arroyo,* 30 P. R. Rep.

390; 295 Fed. 803,—now pending in this Court on certiorari (265 U. S. 577). That for Caguas was before the United States District Court of Porto Rico in *Societe Anonyome des Sucreries de Saint Jean vs. Juan Caldas, Commissioner of Finance of the Municipality of Caguas, Porto Rico,* unreported (Appendix E). The *Arroyo* case was heard and disposed of by the Supreme Court of Porto Rico and by the Court of Appeals along with the instant case.

Assignments of Error.

It is claimed by petitioner that the Court of Appeals erred in six respects (*Petition for Certiorari*, pp. 3-4) as follows:

> "(a) In holding that there had already been imposed a license tax upon the respondent herein for conducting the business of a sugar mill for the year 1921, when the Municipal Assembly of Carolina levied the tax upon the manufacture of sugar within the Municipality by the ordinance enacted February 17th, 1921, effective after July 1st, 1921.
>
> "(b) Assuming that a license tax had already been imposed upon respondent for the year 1921 for conducting the business of a sugar mill, the Circuit Court of Appeals erred in holding that the tax upon the manufacture of sugar imposed by the ordinance of February 17th, 1921, effective after July 1st, 1921, was double taxation and therefore invalid.
>
> "(c) In holding that it was the intention of the Legislature of Porto Rico that any excise tax which should be levied by the Municipality should be one other than those enumerated in Act No. 26 of the Legislature of 1914 re-enacted by the Legislature in 1920, (d) of section 9 of Act No. 9.
>
> "(d) In holding that the Municipality was not authorized to enact the ordinance of February 17th,

1921, by the Act of Congress of 1917 known as the Organic Act for Porto Rico, or by the Legislature of Porto Rico.

"(e) In holding that the tax imposed under the ordinance of Feb. 17th, 1921, imposing a tax upon the manufacture of sugar was a constituent element of a business already taxed by a license tax, and was therefore and [*sic*] not effective.

"(f) In reversing the judgment of the Supreme Court of Porto Rico which upheld the validity of the tax imposed by the ordinance of February 17th, 1921."

The recitals in assignments (a) and (b) of what was held by the Court of Appeals are without foundation in fact (295 Fed. 803, 809). It was not even suggested there either that a license tax for conducting the business of a sugar mill had actually been imposed by the Municipality of Carolina, nor that, if so, the ordinance tax would be invalid because in violation of a prohibition against double taxation. In consequence the first and second assignments of error may be ignored.

In the opinions below there was discussion of (1) whether the Porto Rican legislature authorized the municipality to enact the ordinance; (2) if so, whether the insular statute is in conformity with the Organic Act; (3) whether the tax violates certain restrictions in the Constitution and in the Organic Act. The sole issues raised are covered by those questions.

The Ordinance.

"Municipal Government of Carolina.—Porto Rico.—Municipal Assembly.—Ordinance imposing a tax of ten cents on every hundredweight of sugar manufactured in this municipality in order to meet the budgetary appropriations for the year 1921 to 1922. * * * Whereas subdivision 4 of section 26 of the Municipal

Law empowers the municipalities to levy taxes and excises of whatsoever nature. * * * Whereas this municipality is short of the necessary funds to meet its budgetary expenses for the fiscal year 1921-1922. * * * Now, therefore, be it resolved by the Municipal Assembly of Carolina, P. R. * * *

"Sec. 1. That as and from July 1, 1921, and during the fiscal year 1921-1922, a tax of ten cents shall be imposed and collected by the Municipal Treasurer on every hundredweight of sugar manufactured in the Municipal District of Carolina, the collection of which shall conform to the memoranda furnished by the respective factories.

"Sec. 2. The Municipal Commissioner of Finance is hereby authorized, either personally or by any of the employes of his department, to proceed at intervals to make investigations to ascertain whether the statements furnished by the manufacturers of sugar conform strictly to the number of hundredweights manufactured. * * *

"Sec. 3. The collection of the aforesaid tax shall be made on any day of the months of February, April and June of the year 1922. The amounts so collected shall be used in the technical study of a scheme for the proposed establishment of communities by this municipality; for the erection of inexpensive school buildings and living quarters for teachers in the communities; for the acquisition of lands on which to form such communities, the organization thereof and of school farms.

"Sec. 4. Any person, association or corporation that by false or insidious propaganda or by any other unlawful or malicious means shall attempt to violate or should violate or be the cause of the violation, or shall attempt to delay or be the cause of any delay in the enforcement of any of the provisions of this ordinance, shall be liable to a minimum fine of from five to fifty dollars or imprisonment in jail for from five to fifteen

days, or to both penalties at the discretion of the court. * * *

"Sec. 5. Any ordinance or resolution, or part thereof, in conflict herewith, is hereby repealed. * * *

"Sec. 6. This ordinance, which is unanimously adopted by the members of the Municipal Assembly of this city in session assembled, shall begin to take effect twenty days after its publication in the ordinary way. * * * Approved this seventeenth day of February, 1921" (R. 1-2).

Propositions.

1. The legislature of Porto Rico did not authorize the municipality to levy the tax.

2. The clauses in the Municipal Law upon which alone the ordinance is based fail to comply with the requirement in the Organic Act that taxes for municipal purposes be provided and defined by the legislature.

3. As a levy on property the tax is invalid, because the ordinance imposes a burden which is not uniform and deprives of due process of law.

Argument.

I.

The legislature of Porto Rico did not authorize the municipality to levy the tax.

Porto Rico, being "territory * * * belonging to the United States," is governed by Congressional legislation (*Constitution*, Article IV, section 3). It derives its powers exclusively from the Organic Act (*Balzac vs. Porto Rico*, 258 U. S. 298, 304-314; *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed. 422, 425, 1st C. C. A., 1919). Purporting to rely upon the grant in the Organic Act (Appendix A), the legislature of Porto Rico enacted the Muni-

cipal Law (Appendix D). The sole authority of a muni
cipality is that transmitted to it by the Municipal Law

Assuming that the Municipal Law in every respect com
plies with the Organic Act, the first inquiry is whethe
that law undertook to empower a municipality to levy such
a tax as that laid by the ordinance.

Two sections of the Municipal Law provide for taxation
by a municipality. Section 26, subdivision 4, confers on
the municipal assembly "sole authority * * * to levy taxe
and excise taxes of any kind." Section 49 defines the item
of which "the municipal revenues shall consist"—several o
which are taxes. The sections are complementary. Wha
one describes the other distributes. If a particula
power be granted by one it is included in the other.

Section 49 does not in terms mention taxation of manu
factured articles or of the process of manufacture. Sub
division (d) of that section deals with taxes provided b
"Act No. 26 of March 28, 1924" (hereinafter referred t
as Act No. 26); subdivision (f), with "any other impost
excise or tax." No other subdivision of the section con
tains any authorization on which it is possible to base th
ordinance. If the ordinance is to be sustained, it mus
find its warrant in subdivision (d) or subdivision (f).

Section 49 is in part as follows:

> "That the municipal revenues shall consist of * *
>
> (d) License taxes provided by Act No. 26 of Marc
> 28, 1914, * * *
>
> (f) Any other impost, excise or tax * * * provide
> the object or matter of taxation is not also the objec
> or matter of any federal or insular tax;"

Respondent urges that if the ordinance tax be upon prop
erty, it violates the restraint in (f) against duplication
an insular tax; if an excise, it does not comply with (d) an
is not comprehended within (f).

The Porto Rican legislature (Acts of March 12, 190
and April 13, 1916, as amended; Appendix B) itself in

posed taxes, for both insular and municipal purposes, "upon the value of all real and personal property in Porto Rico." Subdivision (f) of section 49 of the Municipal Law permits a levy thereunder only upon condition that "the object or matter of taxation is not also the object or matter of any federal or insular tax." If the ordinance be construed to impose a tax upon respondent's sugar as property, it is manifestly unlawful; the sugar was already subject to a direct tax—it was already "the object or matter" of an insular tax. Hence, upon the assumption that the ordinance tax is levied on property, it is plainly prohibited by the proviso in subdivision (f).

On the other hand, let the ordinance be interpreted as laying an excise. Can that be justified?

Act No. 26 (Appendix C), continued in force by subdivision (d) of section 49, authorizes a tax for municipal purposes. The tax imposed by Act No. 26 is based on volume, measured in terms of gross receipts, of business transacted (secs. 1, 4). It applies to every "commercial or industrial organization engaged in any of the businesses or industries * * * mentioned" (sec. 1). Among those mentioned, for which rates are specified, are "the businesses of sugar and molasses mills" (secs. 2, 3).

The relevant parts of Act No. 26 are as follows:

> "Sec. 1. That the municipal councils of all the municipalities of the Island of Porto Rico are hereby authorized to levy and collect, under the provisions of this Act, on and from every person, firm, association, partnership, corporation or other form whatsoever of commercial or industrial organization engaged in any of the businesses or industries hereinafter mentioned, the taxes hereinafter enumerated * * *.
>
> Sec. 2. That the businesses or industries upon which the taxes herein provided may be levied, shall be the following: * * *.
>
> *Group C.* The businesses of sugar and molasses mills * * *.

> Sec. 3. * * * said tax shall be paid, * * * on the basis of the volume of business transacted during the calendar year and immediately preceding * * * as hereinafter provided, and at the following rates: * * *
>
> Those of *Group C*:" (Up to $1,000,000 at the rate of 25¢, and in excess of $1,000,000 at 12½¢, annually for each $1,000 of "business transacted").
>
> "Sec. 4. That for the purposes of this Act the volume of business shall be understood to be the gross receipts in any municipality of the business or industry, from its business transactions in Porto Rico, its gain or profits not alone to be considered;"

The ordinance, set out at length near the beginning of this brief (R. 1-2), lays a tax on "sugar manufactured" and requires the collection to "conform to the memoranda furnished by the respective factories" (sec. 1). The proper municipal official is authorized, periodically, "to ascertain whether the statements furnished by the manufacturers of sugar conform strictly to the number of hundredweights manufactured" (sec. 2).

Are the tax authorized by Act No. 26 and the tax laid by the ordinance the same, or is one included in the other? If so, does the clause in the Municipal Law empowering a municipal assembly to lay a tax *different from* that authorized by Act No. 26 confer authority to impose the ordinance tax? The answers to these questions depend merely upon statutory construction. They are the turning point on this branch of the case.

A *sugar mill* and a *sugar factory* are obviously identical. They were treated as the same in the tax laws for Porto Rico during the Spanish rule (*Senate Document* No. 300, p. 47, 56th Congress, 1st Session) and in the insular laws preceding the Jones Act (*Revised Statutes and Codes of Porto Rico*, secs. 56, 61, 1874, Group VI, 2355; *Laws* of 1906, p. 129, group VI; *Laws* of 1910, p. 113, p. 121, sec. 5; *Laws* of 1913, p. 154; *Laws* of 1914, p. 96). It would be trifling with language to endeavor to distinguish them.

A tax on the privilege of conducting a sugar mill necessarily involves the imposition of a levy upon its carrying on the process of manufacturing sugar. Unless it manufactured sugar, the plant would not be a sugar mill; if it manufactures sugar, it is a sugar factory. Because the payment which may be exacted from a sugar mill under Act No. 26 is in proportion to the proceeds derived from its output, it would be impossible thereunder to collect a tax from such a mill unless it produced sugar. The production of sugar is manufacture. That is the very process which is taxed by the ordinance—on the present assumption that it imposes an excise. The conclusion is inescapable that the thing that Act No. 26 authorizes to be taxed is actually taxed by the ordinance. While the amount of the levy is determined in one instance by volume of business done and in the other by weight, nevertheless every concern producing sugar by a process of manufacture, comprehended within either Act No. 26 or the ordinance, is subject to the burdens resulting from both.

Subdivision (f) of section 49 permits levies of any "*other* impost, excise or tax." Neither Act No. 26 nor the ordinance deals with imposts. On this branch of the argument it is assumed that neither involves a direct tax. Act No. 26 authorizes an excise. The ordinance is treated as imposing an excise. If the latter excise be the same as or be embraced within the former, it is obviously unauthorized. Subdivision (d) recites taxation under Act No. 26 as an allowable source of municipal revenue. "Other" types of excise, under subdivision (f), cannot possibly include an excise covered by subdivision (d).

When it passed the ordinance the municipality had the right to proceed under Act No. 26. It failed to do so. Merely casual inspection demonstrates this. For example, the statute prescribes a tax upon transactions conducted, stated in terms of value in dollars; the ordinance, a tax upon the same transactions, stated in terms of quantity irrespective of price or value. Accordingly, the ordinance cannot be sustained as an attempted exercise of power conferred by subdivision (d).

It may be said that the business of carrying on a sugar mill is more extensive than the conduct of a sugar factory. For example, it may be further said that a sugar mill markets the sugar produced by it, while a sugar factory might confine itself to manufacturing sugar. If this be conceded, it does not change the result; it would merely be equivalent to asserting that the manufacture of sugar is only a part, though an essential part, of the business of a sugar mill.

A tax upon a necessary element of a business, however, is a tax upon the business itself (*Tuscaloosa vs. Hollezstein*, 134 Ala. 636; *Ex parte R. W. Simms*, 40 Fla. 432, 441-2; *Canova vs. Williams*, 41 Fla. 509, 518-9; *Hewin vs. Atlanta*, 121 Ga. 723, 729-737; *Hotelling vs. Chicago*, 66 Ill. 289, 291-2; *Commonwealth vs. Fowler*, 96 Ky. 166, 170-1; *Commonwealth vs. Pearl Laundry Co.*, 105 Ky. 259, 265-6; *Newport vs. Fitzer*, 131 Ky. 544, 546-9; *Williams vs. Garignes*, 30 La. Ann. 1094; *Walker vs. New Orleans*, 31 La. Ann. 828; *Carney vs. Hamilton*, 89 Miss. 747; *Bell vs. Watson & Bro.*, 3 Lea (Tenn.) 328, 329-331; *Vosse vs. Memphis*, 77 Tenn. 294). Hence when the business in its entirety is already taxed, an authorization in general terms to levy any "other" tax does not confer power to impose an additional tax upon such element.

In *Bell vs. Watson & Bro., supra*, a tax, at so much per stall, was imposed upon the privilege of keeping a livery stable; another, at a fixed sum on each vehicle, for the privilege of running hacks for profit. In holding that one who paid the former was not subject to the latter tax, because running hacks was included in the conduct of a livery stable, it was said (pp. 329, 330, 331):

> "The real question, however, is whether the Legislature intended that the keeper of a livery stable should pay a license tax for the privilege of carrying on the business, and also separate license taxes for the privilege of exercising essential parts of that business. * * * Whatever power the Legislature may have

to levy double taxes, the presumption always is against such an intent. The statute will not be construed so as to impose duplicate taxation, unless the construction is required by its express words or necessary implication. * * * The safe and sound rule of construction of revenue laws is to hold, in the absence of express words plainly disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the same privilege.

"In order to prevent misconstruction, it is proper to add that the present rule applies only in a case where the occupation or business, the privilege tax upon which would be a double charge, is an essential part of the business for the exercise of which a license had been taken out."

It has been suggested that the record does not disclose whether the municipality ever levied or collected a tax under Act No. 26. That, however, is immaterial. All that it is pertinent to ask is whether subdivision (f) authorized the ordinance. That it did not is just as true if no tax were levied or paid, as it would be if a tax was in fact levied and paid, under Act No. 26. As previously stated, the sole excises which subdivision (f) authorized to be imposed were ones different from the excises authorized by Act No. 26 or by any subdivision of section 49 preceding subdivision (f). It follows that if in any part of section 49 outside of subdivision (f) there was authorization to impose such an excise as that embodied in the ordinance, then necessarily subdivision (f) conferred no authority to enact the ordinance—because a tax authorized by any part of section 49 outside of subdivision (f) could not possibly be included in the authorization by subdivision (f) to levy "other" taxes. As already said, the ordinance tax cannot be sustained as to an exercise of the authority conferred on municipalities by Act No. 26, among other things, for the reason that the ordinance does not comply

with the requirement in Act No. 26 that the rate of taxation thereunder be proportionate to the volume of business done by the factory.

Again, it is pointed out by petitioner that double taxation is generally allowable; that usually whether a taxpayer should be mulcted twice on the same account is merely a matter of policy. Authorities are cited sustaining the power of either Congress or a State concurrently to impose both types of excise now under discussion. Attention is called to instances of valid Congressional and State legislation which taxed a constituent element of a business already taxed as a whole. All this, however, is beside the mark; the conclusion sought to be drawn does not follow. The considerations adverted to relate to the extent to which authority may be conferred—not to the extent to which it was the purpose of a legislative body to exercise an undisputed authority. The problem for the moment is one of intent—not of power; the determining factor here is what was put in to the Municipal Law—not what could have been put there. What did the legislature of Porto Rico mean when it framed subdivisions (d) and (f)? The answer seems plain and unavoidable. When it was said that *other* excises might be levied, the words necessarily excluded from (f) everything included in (d). If (d), by virtue of retaining Act No. 26 in force, authorized a municipality to levy an excise on the manufacture of sugar, then (f) did not.

Apparently petitioner conceives that the argument of respondent in this connection is completely answered if it be established that the ordinance did not impose a tax which was a duplication of an already existing insular tax. If this be the position of petitioner, he has wholly misinterpreted the contention of respondent. What respondent says, and what is relied upon on this branch of the case, is that (1) if the ordinance tax be on property, then it is a duplication of the insular tax on property levied by the Acts of 1908 and 1916 (Appendix B) and hence would

violate the proviso in subdivision (f) of section 49 of the Municipal Law; (2) on the other hand, if the ordinance tax be treated as an excise, then—wholly irrespective of whether or not it duplicates an insular tax—subdivision (f) conferred no authority to levy it, because the word "other" in subdivision (f) excluded from the authority conferred by that subdivision any authorization embraced in a preceding subdivision, and subdivision (d) of section 49, by continuing Act No. 26 in effect, itself authorized the imposition of an excise upon the business of conducting a sugar mill, which either is the same as or includes the manufacture of sugar.

Irrespective therefore of whether the ordinance tax be direct or be indirect, be upon property or be an excise, as matter of statutory interpretation the legislature of Porto Rico never authorized the Municipality of Carolina to levy it.

II.

The clauses in the Municipal Law upon which alone the ordinance is based fail to comply with the requirement in the Organic Act that taxes for municipal purposes be provided and defined by the legislature.

The Municipal Law (Appendix D) grants to the municipal assembly power to levy "taxes and excise taxes of any kind" and any "impost, excise or tax" other than specified types which are of no concern here. These words, contained in subdivision 4 of section 26 and subdivision (f) of section 49 of the Municipal Law, are the only source from which the ordinance can spring.

Section 3 of the Organic Act (Appendix D) provides that "taxes and assessments on property, internal revenue, and license fees * * * may be imposed for the purposes of the Insular and Municipal Governments, respectively, as may be provided and defined by the Legislature of Porto Rico." These words constitute the entire founda-

tion on which the quoted part of the Municipal Law can rest. It is obvious from inspection that both clauses are general in phraseology. If either clause be unauthorized, because of lack of definiteness in the form in which the legislature has attempted to confer power on the municipalities, both are. They embrace excises as well as taxes on property. Consequently, in reaching a conclusion it is immaterial to consider whether the ordinance tax is imposed on property or is an excise.

Does the Organic Act require the legislature itself to provide and define municipal taxes? If so, has the legislature provided and defined the ordinance tax?

The pertinent portions of the Organic Act are as follows:

> "Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the law. * * *
>
> That the rule of taxation in Porto Rico shall be uniform. * * *.
>
> Sec. 3. That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges and concessions may be imposed for the purposes of the Insular and Municipal Governments, respectively, as may be provided and defined by the Legislature of Porto Rico;"

Discussion of the clauses in section 2 will be deferred. They should be borne in mind, however, in connection with the requirement in section 3 that the legislature provide and define the taxes to which that requirement applies.

In the beginning let it be noted that the taxes dealt with in section 3 of the Organic Act are municipal as well as insular. The use of the word "respectively" puts that beyond dispute. Congress was free to retain to itself the function of taxation in Porto Rico. It was free

to confer that for municipal purposes on the legislature, on the municipalities or on whomsoever it saw fit. It chose to say that municipal taxes should be only "as may be provided and defined" by the legislature.

Let it also be noted that the mandate to the legislature is not confined to the drawing by it of a line between the uses which shall be made by the two types of government of the gross amount of revenues from taxation. The direction goes much further. The authority to impose relates to taxes for municipal as well as for insular purposes. That authority is explicitly modified by the clause, "as may be provided and defined by the legislature." It follows that unless the legislature provides and defines, the municipalities can acquire no power to tax; until the legislature provides and defines, the municipalities have no power to tax; the sole power to tax which the municipalities can ever get is that which is provided and defined by the legislature.

After specifying certain kinds of municipal taxes which do not include the ordinance tax, the legislature undertook to transfer to the municipal assemblies all the unused portion of its own power to tax for municipal purposes. That is the only permissible interpretation of the sweeping language employed. No more comprehensive words about taxation could be found than "taxes and excise taxes of any kind" or any "impost, excise or tax." It seems manifest that this was not either *provision* or *definition* by the legislature. If so, it is equally manifest that the restraint prescribed by Congress was infringed.

In dealing with municipal taxes the Municipal Law sets no limit upon the subject, rate or duration. There is no qualification. The effort is to delegate completely. In no sense is the content of the exaction either "provided" or "defined" (*Robert J. Boyd Paving & Construction Co. vs. Ward*, 85 Fed. 27, 34-5, 38, 8th C. C. A., 1898; *Societe Anonyome des Sucreries de Saint Jean vs. Juan Caldas, Commissioner of Finance of the Municipality of Caguas, Porto Rico*, Appendix E, 4th point).

In the *Boyd* case, *supra*, the question was whether a city of the fourth class had authority to build sewers at the expense of property benefited. Section 7, article 9, of the State constitution directed the general assembly to "provide, by general laws, for the organization and classification of cities and towns"; also that "the power of each class shall be defined by general laws." The legislature allowed municipalities of the third and fourth class, by popular referendum, to determine for themselves whether to exercise the authority in controversy (*Laws of Missouri*, 1893, p. 101). Referring to that statute, the court said (p. 35):

> "* * * this law fails to define the power of the members of the fourth class of municipal corporations relative to the subject of which it treats as required by the provision of section 7 under consideration. That section requires this power to be defined by law. To define is 'to fix, establish, or prescribe authoritatively.' 2 Cent. Dict. p. 1503, 'Define,' 2. This law leaves the voters of the various municipalities to 'fix, establish, or prescribe authoritatively' what power their respective municipal authorities shall have under it, and constitutes the records of their respective cities the only evidence of the extent of the power vested in them under this law. To state these facts is to demonstrate the proposition that here is no definition by general law of the power of municipal corporations of the fourth class to construct sewers at the expense of the property benefited, for an examination of the law gives no information whether any of the members of that class have adopted its provisions or acquired the powers it offers."

The phrases "provide by general laws" and "defined by general laws" and the phrase "provided and defined by the legislature" are exactly synonymous in substance

and effect. If the *Boyd* case be sound therefore, the conclusion is inescapable that the grant of power in section 3 of the Organic Act was exceeded in the attempt by the Porto Rican legislature to transfer that power undiminished to the municipalities; the effort was abortive.

There is nothing in the Municipal Law or elsewhere, emanating from the legislature of Porto Rico, which either provides or defines the character of tax that is embodied in the ordinance. On the contrary, by the broad language in which subdivision 4 of section 26 and subdivision (f) of section 49 of the Municipal Law are expressed, the legislature attempted to abdicate its own functions and to pass them to the municipalities. Under these general terms, so long as duplication of federal and insular taxes was avoided, a municipality was left free to select any type of tax it chose. The disobedience by the legislature of the limitation imposed renders invalid the clauses of the Municipal Law under discussion.

It is said by petitioner that municipalities customarily exercise delegated power; that section 37 of the Organic Act expressly authorized the legislature of Porto Rico "to create, consolidate and reorganize the municipalities;" and that power of taxation is an essential incident of a municipality (*United States ex rel Ranger vs. New Orleans*, 98 U. S. 381, 393, 397). All these things may be conceded. It does not follow, however, either that Congress may not depart or that it has not departed from the rules which ordinarily apply to municipalities in the United States.

In the first place, it is indisputable that it was competent for Congress to withhold from municipalities in Porto Rico any authority whatever to levy taxes or to attach any condition it saw fit to a grant to them, either directly or through the legislature of Porto Rico, of the power of taxation (*Mormon Church vs. U. S.*, 136 U. S. 1, 42; *Parsons vs. District of Columbia*, 170 U. S. 45, 51-2, 56; *Simms vs. Simms*, 175 U. S. 162, 168; *Downes vs. Bidwell*, 182 U. S. 244, 267-8; *Binns vs. U. S.*, 194 U. S. 486,

491-2; *Oklahoma vs. Atchison, etc., Ry.*, 220 U. S. 277, 285; *Christianson vs. King Co.*, 239 U. S. 356, 362; *Balzac vs. Porto Rico*, 258 U. S. 298, 304-314).

In the second place, Congress did impose specific limitations upon the authority of municipalities to levy taxes. Among these limitations is the express requirement that whatever taxes are levied for the benefit of municipalities shall be "provided and defined by the Legislature of Porto Rico."

Up to this point consideration has been confined to the words employed. If account be taken of the purpose, that will but add support to the conclusion reached.

By the Jones Act Congress was conferring new powers of taxation and prescribing new safeguards for the rights of Porto Ricans. Manifestly a distribution of authority, either directly by Congress itself or through the Porto Rican legislature, to a large group of municipalities would increase the difficulty of preserving and enforcing these rights. Accordingly, in granting authority to legislate concerning taxes, Congress prescribed that for municipal as well as for insular purposes the guiding hand should continue to be the legislature of Porto Rico. The object of requiring legislative control of taxation for both purposes was to assure the accomplishment of the design of Congress in conferring the rights defined in section 2. The means adopted were appropriate to this end; indeed, limitation of the tax power to the extent that its exercise must be by or through the legislature itself was the only means that was appropriate.

Without regard therefore to details or to the extent to which the legislature may go in employing the municipal assemblies in raising revenue for the support of the municipalities, it is manifest that the will of Congress would be wholly defeated if the Organic Act were held to vest in the Porto Rican legislature power to delegate to municipal assemblies unlimited power of taxation.

Moreover, the Organic Act requires "the rule of taxation" in Porto Rico to be uniform. As elsewhere pointed

out, mere geographical uniformity is not enough. There must at least be uniformity in methods and subjects of levies authorized; also there must be equality of burden—certainly as to taxes on property; possibly as to excises also—in municipal as well as in insular taxation. Such equality cannot be maintained except through a single body; as that body, Congress selected the legislature. The necessity for that device is illustrated by the fact that the entire schemes for the levies on sugar by Arroyo and Caguas (295 Fed. 803; Appendix E) are very different from the scheme for the levy on sugar by Carolina. It is probable, in part at least, in order to preserve this uniformity that the legislature is directed to provide and define taxes for the municipalities (*Boyd* case, *supra,* pp. 36-7; *Caguas* case, Appendix E, 3rd point).

It is further urged by petitioner that the Organic Act discloses on its face the design of Congress to promote local self government in Porto Rico. It is suggested that an interpretation should be favored that will promote this policy. Agreement with these contentions, however, is not at variance with the insistence that an express duty was put upon the legislature and an implied prohibition on the municipalities in regard to taxes. Moreover, it is to be borne in mind that under the Spanish system control of all local affairs was retained by a strong central government (Appendix E, 4th point); also that, in contradistinction to the legislatures of the States, which possess all power of a legislative nature not denied to them by the Federal or State constitutions, the legislature of Porto Rico has only such power as is affirmatively granted. The language of section 37 of the Organic Act permits the legislature of Porto Rico wide latitude in the regulation of municipalities; but that in no wise relieves it from the obligation itself to provide and define municipal taxes.

In view of the failure of the Municipal Law to comply with the restriction in the Organic Act the tax clauses on which the ordinance rests are void.

III.

As a levy on property the tax is invalid, because the ordinance imposes a burden which is not uniform and deprives of due process of law.

Section 2 of the Organic Act (Appendix A) requires that "the rule of taxation in Porto Rico shall be uniform." This is one of a group of new provisions, derived chiefly from constitutions of the States, which Congress enacted in 1917 as a bill of rights for Porto Rico (*Senate Report* No. 579, p. 2, 64th Congress, 1st Session; *Congressional Record*, vol. 54, pp. 1325, 2248).

The phraseology having been taken from those constitutions, presumptively it is to be interpreted in the way it had been construed previously by the States (*The Abbottsford*, 98 U. S. 440, 444; *McDonald vs. Hovey*, 110 U. S. 619, 627-8; *United States vs. Mooney*, 116 U. S. 104, 106; *Logan vs. United States*, 144 U. S. 263, 301; *Lawder vs. Stone*, 187 U. S. 281, 293; *Kepner vs. United States*, 195 U. S. 100, 124; *Standard Oil Co. vs. United States*, 221 U. S. 1, 59; *Norfolk Southern R. R. Co. vs. Chatman*, 244 U. S. 276, 280-1; *United States vs. Merriam*, 263 U. S. 179, 187). It will be given the same meaning unless the context shows a contrary intent—and no such appears here.

The State courts had held that the uniformity required meant equality of burden, on the basis of value, in the operation of the tax laws (*Exchange Bank of Columbus vs. Hines*, 3 Ohio St. 1, 15-6; *Wasson vs. Commissioners*, 49 Ohio St. 622, 635-6; *State vs. Jones*, 51 Ohio St. 492, at p. 505; *Knowlton vs. Supervisors of Rock Co.*, 9 Wis. 410, 420-1; *Attorney General vs. Winnebago Lake, etc., Co.*, 11 Wis. 35, 39-42; *Weeks vs. City of Milwaukee*, 10 Wis. 242, 256-8, 262-3; *State ex rel Reedsburg Bank vs. Hastings*, 12 Wis. 47).

In Ohio the constitution requires "taxing by a uniform rule." In the *Hines* case, *supra* (pp. 15, 16), it was said:

> "Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. * * * But the uniformity in the rule required by the constitution, does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike, equally—which is taxing by a uniform rule. * * * the rule of uniformity in taxation, required by our State constitution, has a direct reference to the things taxed—to all taxable property, and forbids discrimination in the burden upon the different subjects of taxation."

In Wisconsin the constitution provides, in the precise words of the Organic Act, that "the rule of taxation shall be uniform." In the *Knowlton* case, *supra* (pp. 420, 421), it was said of the clause:

> "Its mandate, it is true, is very brief, but long enough for all practical purposes; long enough to embrace within it clearly and concisely the doctrine which the framers intended to establish, viz: that of equality * * *; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised."

The section in the Wisconsin constitution containing the uniformity rule also provides that "taxes shall be levied upon such property as the legislature shall prescribe." It was held that the latter clause empowers the legislature to create reasonable exemptions and classifications (*Milwaukee & Mississippi R. Co. vs. Board of Su-*

pervisors, 9 Wis. 431, 436-7, 449; *Wisconsin Central Railroad Co. vs. Taylor County*, 52 Wis. 37, 57-76, 88-96; *State ex rel Sanderson vs. Mann*, 76 Wis. 469, 476-7; *State vs. Whitcom*, 122 Wis. 110, 118-9; *Kingsley vs. Merrill*, 122 Wis. 185, 194-8; *Chicago & N. W. R. Co. vs. State*, 128 Wis. 553, 591-604; *Milwaukee County vs. Halsey*, 149 Wis. 82, 93; *State ex rel Bernhard Stern & Sons vs. Bodden*, 165 Wis. 75, 81-2); but this holding in no wise weakened the interpretation of the uniformity clause as requiring that in taxation of like property there shall be imposed equality of burden in terms of value (*Chicago & N. W. R. Co. vs. State*, 128 Wis. 553, 602-616).

While of course a matter for determination by the States, it may be noted that the principle embodied in the quotations from the Ohio and Wisconsin cases apparently has been approved by this Court (*Gilman vs. The City of Sheboygan*, 2 Black 510, 513-8; *Township of Pine Grove vs. Talcott*, 19 Wall. 666, at p. 675; *Cummings vs. National Bank*, 101 U. S. 153, 158; *Greene vs. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515).

Construing the words, "the rule of taxation * * * shall be uniform," in the same sense in which they were employed by the States from whose constitutions they were taken, it is clear that the insular legislature is restrained from imposing taxes which arbitrarily discriminate against particular property or which do not treat substantially alike all similar property or which disregard value in prescribing the toll demanded.

The ordinance tax is laid only on sugar manufactured within the territorial limits of the Municipality of Carolina; it does not affect sugar produced elsewhere which is marketed there. A fixed sum is exacted for each hundred weight locally manufactured without regard to variation in its grade, quality or value. Moreover, the tax is imposed exclusively upon sugar; it does not extend to any other commodity or to the manufacture of any other commodity. There is no pretense of classification. It is obvi

ous therefore that if uniformity of burden be required, the ordinance is void.

It has been suggested that the test of uniformity is geographical only. *Knowlton vs. Moore*, 178 U. S. 41, is relied on. The vice of the contention is that the uniformity there discussed satisfies merely the requirement of Article I, section 8, of the Constitution. That relates exclusively to "duties, imposts and excises," laid by Congress itself, within the territorial limits of the United States; it does not apply to the limitation which Congress, in the exercise of its authority to prescribe regulations for the government of the property of the United States, has injected into the Porto Rican tax system as an added requirement.

It has also been suggested that, while there must be uniformity in insular taxation, it is not necessary in municipal taxation. By its express terms section 2 applies "in Porto Rico." Upon its face this means throughout Porto Rico. If the restriction related only to insular taxation, the protection would be illusory; it could be easily nullified. It would be anomalous if the legislature could confer upon municipalities power more extensive than its own. It would be tantamount to an agent being less restrained than his principal or to a stream rising higher than its source. Moreover, as section 3 plainly governs both municipal and insular taxation, no reason is apparent for confining the immediately preceding section to a smaller field; and section 23 of the Municipal Law expressly extends to municipal assemblies the limitations imposed on the legislature by the Organic Act.

In some quarters it is said or unmistakably implied that where—as here—the primary purpose of an excise is revenue, the uniformity rule applies to it (for example, Dodge, J., dissenting in *Nunnemacher vs. State*, 129 Wis. 228; *St. Louis vs. Spiegel*, 75 Mo. 145; see also *Ward vs. Maryland*, 12 Wall. 418, 429, 431; *St. Louis vs. United Railways Co.*, 210 U. S. 266, 273, 279). The weight of authority confines application of the rule to taxes on property (for example, *People vs. Naglee*, 1 Cal. 232, 253;

Beebe vs. Wells, 37 Kans. 472, 475; *State vs. Philadelphia, etc., R. Co.*, 45 Md. 361, 379; *State vs. Applegarth*, 81 Md. 293, 300; *State vs. Richards*, 52 N. J. L. 156, 158; *Railroad vs. Reidsville*, 101 N. C. 404, 407; *Baker vs. Cincinnati*, 11 Ohio St. 534, 540-1; *Cincinnati Gas Light, etc., Co. vs. State*, 18 Ohio St. 237, 242; *Rhinehart vs. State*, 121 Tenn. 420, 436; *Pullman P. C. Co. vs. State*, 64 Tex. 274, 275-7; *Chicago & N. W. R. Co. vs. State*, 128 Wis. 553, 588-591; *Nunnemacher vs. State*, 129 Wis. 190, 220-2; *In re Watson*, 15 Fed. 516, note u). So far as discovered the question has not been directly passed on by this Court. Upon the view most adverse to respondent, however, it is indisputable that uniformity, in accordance with valuation, of the burden imposed by taxation on property is essential.

The ordinance requires the tax to be collected by the Municipal Treasurer and the collection to conform to memoranda furnished by the factory. It authorizes the Municipal Commissioner of Finance, personally or through an employee, by investigation to ascertain whether the manufacturer's statement is correct. Certain forms of agitation against and obstruction of enforcement of the ordinance are made crimes.

Nowhere is it provided that there shall be notice to the taxpayer of the quantity of sugar subject to tax or of the amount of money claimed from him or of any charge of error committed by him, nor that he be afforded opportunity for a hearing. The direction to municipal officials is, without condition or qualification, to collect the tax at a fixed rate and to investigate whether information given by the factory is true. They are instructed to conduct inquiries, to exercise judgment, to reach conclusions. These vitally affect the citizen engaged in manufacturing sugar. Through them liabilities may be imposed or attempted. Yet all may proceed—in strict conformity with the authority conferred—with the utmost secrecy and without chance for a protest or objection to be presented or for a revision to be obtained.

Neither in the ordinance nor elsewhere is there provided an opportunity for court review in advance of col-

lection of an assessment of municipal taxes, so as by substitution of a judicial for an administrative hearing to satisfy the requirement of due process (*Hetrick vs. Village of Lindsey*, 265 U. S. 384, 387). It may be suggested that the Act of March 9, 1911 (*Laws of* 1911, p. 124) permits payment under protest of revenue conceived by the taxpayer to be erroneous and suit for its recovery; but that statute applies exclusively to insular taxes and to suits against the insular treasurer and gives a remedy only after the event.

It needs no argument to demonstrate that if the tax be on property, it is invalid—because of lack of a grievance day, in violation of the due process clause of the Fifth Amendment to the Constitution and section 2 of the Organic Act requiring due process of law (*Security Trust Co. vs. Lexington*, 203 U. S. 323, at p. 333; *Central of Georgia R. Co. vs. Wright*, 207 U. S. 127, 138, 142; *Londoner vs. Denver*, 210 U. S. 373, 385; *Coe vs. Armour Fertilizer Works*, 237 U. S. 413, 424-5; *Turner vs. Wade*, 254 U. S. 64, 67-70; *Regal Drug Corp. vs. Wardell*, 260 U. S. 386, 392).

Is the tax imposed on property? If the test be that applied to taxation by Congress within the territorial limits of the United States, it is conceded that the long list of cases from *Hylton vs. United States*, 3 Dallas 171, to *Flint vs. Stone Tracy Co.*, 220 U. S. 107, drawing the line of demarcation between direct and indirect taxes, has firmly established that the tax here is an excise. While the argument is presented with diffidence, a recent decision of this Court, which it is difficult to distinguish in application from the case at bar, apparently holds that this is upon property.

In *Dawson vs. Kentucky Distilleries Co.*, 255 U. S. 288, the statute (*Acts of Kentucky*, 1920, p. 27) imposed what it called "a license tax." The persons required to pay it were those "engaged in the business of storing such (distilled) spirits in bonded warehouses * * * and in removing

same therefrom." The levy was "fifty cents on every proof gallon of said distilled spirits so * * * stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth." The tax accrued when the articles were "removed from the bonded warehouse * * * or transferred under bond out of this State."

This Court said (pp. 292-4) that the tax had none of the ordinary incidents of an occupation tax (*Oliver Iron Co. vs. Lord*, 262 U. S. 172, 177) and was "imposed upon each lot of whiskey at the time it is removed from bond within the State."

In effect here the tax is on the sugar produced by respondent; it is laid upon the article itself. If a tax on whiskey removed be a tax on property, it would seem equally to follow that a tax on sugar manufactured is a tax on property.

To the same effect are *State vs. Cumb. & Penn. R. R.*, 40 Md. 22, 41-2, 50-1; *Thompson vs. Kreutzer*, 112 Miss. 165; *Thompson vs. McLeod*, 112 Miss. 383; *State vs. Bengsch*, 170 Mo. 81, 109-112; *Railway Co. vs. State*, 49 Ohio St. 189, 201-2; *Ellis vs. Frazier*, 38 Oregon 462, 466-8; *State vs. Railroad Corporations*, 4 S. C. 376.

The Foraker Act of 1900 (31 *Stat.* 86, sec. 38) provided as follows:

> "That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by *act of the legislative assembly*:" * * *

Section 3 of the Jones Act of 1917 (Appendix A) provides as follows:

> "That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assess-

ments on property, *internal revenue*, and license fees, *and royalties* for franchises, privileges and concessions may be imposed for the purposes of the Insular and Municipal Governments, respectively, as may be provided and defined by the *Legislature of Porto Rico*;"
• • •

The changes made by the later statute are indicated by italics. It may be argued that the use of the words "internal revenue"—immediately adjacent to the authorization of taxes on property—implies an intent by Congress to employ in Porto Rican taxation the test of what is a property tax and what an excise that exists in Federal taxation.

It is true that an excise, measured by quantity of a manufactured article, is a familiar form of revenue in the United States (*Patton vs. Brady*, 184 U. S. 608, 617). The suggestion is that, as the ordinance tax would be an excise if laid by Congress itself, it must be an excise if laid by Porto Rico. The conclusion, however, does not follow. The circumstances are wholly different. When Congress taxes, it is restrained by Article I, sections 2, 8 and 9, of the Constitution. As previously pointed out, those sections, which contain the sole provisions which would require the tax to be classed as an excise if laid by Congress, are not applicable to taxation in Porto Rico.

It may be conceded that the addition by the Jones Act of the words "internal revenue" created or extended the authority to impose excises in Porto Rico. At the moment, however, the inquiry is not about power. The problem is whether the ordinance tax is on property. That can be determined only by considering the nature and operation of the imposition. If economically it is a burden directly on property—as brought out in and is consistent with the decisions of this Court—then it is a property tax for State and hence for Porto Rican purposes (*Veazie Bank vs. Fenno*, 8 Wall. 533, 541-7; *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, 573-4, 579-583; 158 U. S. 601, 622-

633). As heretofore urged, the toll taken by the ordinance from a manufacturer of sugar is, so far as concerns the product of his factory, a complete duplication of the toll taken under the law avowedly imposing a tax on property.

It is submitted that to a mind wholly freed from the habit engendered by the historic controversies growing out of the peculiar tax provisions of the Constitution there is persuasive reason, as an original proposition, for treating the tax involved in the instant case as imposed upon property.

IV

The judgment of the Court of Appeals should be affirmed, with costs.

Dated, New York City,
April 17, 1925.

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APPENDIX.

A. Organic (Jones) Act of March 2, 1917.

(39 *Stat.* 951-974; *Laws of* 1917 *of Porto Rico,* pp. 6-68; *Fed. Stat. Ann.,* ed. 2, *Supp.* 1918, pp. 608-630; *U. S. Comp. Stat. Supp.* 1919, vol. 1, secs. 3803a-z, pp. 867-891).

Sec. 2.—That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the law. * * *

That the rule of taxation in Porto Rico shall be uniform. * * *.

Sec. 3.—That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges and concessions may be imposed for the purposes of the Insular and Municipal Governments, respectively, as may be provided and defined by the Legislature of Porto Rico; * * *.

Sec. 25.—That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature which shall consist of two houses, one the Senate and the other the House of Representatives, and the two houses shall be designated "the Legislature of Porto Rico."

Sec. 37.—That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; * * *.

B. Taxes on property.

(*Political Code of Porto Rico,* sec. 285 et seq.; *Laws of* 1908, pp. 187-8; *Laws of* 1916, p. 132; *Laws of* 1919, pp. 708, 710).

(1) *Act of March* 12, 1908, *as amended.*

That for and during the fiscal year beginning the first day of July, nineteen hundred and eight, and ending the thirtieth day of June, nineteen hundred and nine, and in every succeeding fiscal year, unless otherwise provided by the Legislative Assembly of Porto Rico, there shall be levied and collected, for the purpose of providing insular and municipal revenue, by the Insular Government, a tax of ten one-hundredths of one per cent and by the municipalities a tax of not exceeding ninety one-hundredths of one per cent upon the value of all real and personal property in Porto Rico, and of all personal property of persons residing in Porto Rico, to be ascertained as hereinafter provided, not hereinafter exempted from taxation. * * *. The Treasurer shall pay monthly, pursuant to law, upon the warrant of the Auditor, countersigned by the Governor of Porto Rico, of each dollar collected on account of each municipality, to the treasurer of each local school board the sum of twenty-five cents, to the treasurer of each municipality, to be covered into the "Road Fund," the sum of eight cents, and the balance to the treasurer of the municipality; * * *

(2) *Act of April* 13, 1916, *as amended in* 1919.

Section 2.—That for and during the fiscal year beginning the first day of July, 1919, and ending the 30th day of June, 1920, and for every succeeding fiscal year, unless otherwise provided by the Legislative Assembly of Porto Rico, the rate of the regular general property tax prescribed in an act approved March 12, 1908, (*supra*) * * * to be collected by the Treasurer of Porto Rico on behalf of the municipalities shall be eighty hundredths of one per centum for municipalities of the first class, and ninety hundredths of one per centum for municipalities of the second and third class.

C. Act No. 26 of March 28, 1914.

(*Laws of* 1914, pp. 174-182; *Laws of* 1919, p. 712; *Laws of* 1920, pp. 70, 72).

Sec. 1.—That the municipal councils of all the municipalities of the Island of Porto Rico are hereby authorized to levy and collect, under the provisions of this Act, on and from every person, firm, association, partnership, corporation or other form whatsoever of commercial or industrial organization engaged in any of the businesses or industries hereinafter mentioned, the taxes hereinafter enumerated, at the rates herein prescribed, or at such uniform percentage of said rates as the said municipal councils may prescribe, and the proceeds thereof shall be used in meeting their budgetary expenses; *Provided,* That if any municipality shall levy said taxes, at less than the full rates herein prescribed, for any business or industry subject to taxation in accordance with this Act, a proportional reduction from said full rates shall be made for all businesses or industries within the said municipality; * * *.

Sec. 2.—That the businesses or industries upon which the taxes herein provided may be levied, shall be the following: * * *

Group C.—The businesses of sugar and molasses mills, * * *.

Sec. 3.—That all persons, firms, associations, partnerships, corporations or other form whatsoever of commercial or industrial organizations engaged in any of the businesses or industries specified in the preceding section shall pay to the treasurers of the municipalities in which such businesses or industries are situated, the tax levied by the municipal council, in accordance with this Act; said tax shall be paid, in advance, at the beginning of each quarter of the fiscal year, on the basis of the volume of business transacted during the calendar year and immediately preceding, except in the case of new industries or businesses, as hereinafter provided, and at the following rates: * * *

Those of *Group C*:

For each $1,000 or fraction thereof in excess of the first $500 of volume of business transacted, up to $1,000,000 inclusive	$0.25 a year

For each $1,000 or fraction thereof in excess of the first $1,000,000 of volume of business transacted.....$0.125 a year.

Sec. 4.—That for the purposes of this Act the volume of business shall be understood to be the gross receipts in any municipality of the business or industry, from its business transactions in Porto Rico, its gain or profits not alone to be considered; * * *.

D. Municipal Law of Porto Rico.

(*Laws of* 1919, pp. 684-732; *Laws of* 1920, pp. 52-90).

Sec. 1.—That this Act shall be known as the "Municipal Law," and shall be applicable to all municipalities at present existing, and to such municipalities as may be created hereafter in accordance with the provisions hereof.

Sec. 5.—That the inhabitants of municipalities at present existing and of such municipalities as may be hereafter created in accordance with this Act, are hereby and henceforth constituted into a body politic and juridic under the present name of each such municipality and under such name as each newly created municipality may adopt, * * *. In their aforesaid juridic capacity municipalities may perform such general functions as may be necessary for the proper exercise of their said powers as herein provided, and they may further exercise such powers as are expressly conferred upon them by this Act.

Sec. 8.—That * * * all expenses and obligations incurred or contracted or to be incurred or contracted in or for works and improvements of the municipality, or for the development thereof, shall be paid by the respective municipalities, which shall have power to provide such funds as may be necessary therefor in accordance with the provisions of this Act.

Sec. 9.—That municipalities shall have full legislative and administrative powers in all matters of a purely local nature and connected with * * * municipal revenues, * * *; *Provided*, That such powers shall be exercised subject to

such laws of Porto Rico and of the United States as may be in force, and that no ordinance or resolution shall be passed or action taken which in any way conflicts with any of said laws.

Sec. 13.—(Divides municipalities into three classes according to the amount of total assessments).

Sec. 14.—That for the purposes of the preceding section the assessment made by the Treasurer of Porto Rico for the levying of insular taxes shall govern.

Sec. 15.—That the government of each municipality is hereby vested in a municipal assembly and a council of administration.

Sec. 23.—That all limitations imposed by the Organic Act of Porto Rico on the Legislature and its members shall be applicable, as far as possible, to the municipal assembly and the members thereof.

Sec. 26.—That the municipal assembly shall have sole authority— * * *

4. To levy taxes and excise taxes of any kind; * * *.

Sec. 49.—That the municipal revenues shall consist of—

(a) The revenues and proceeds from municipal property;

(b) The proceeds of any tax on real and personal property in the municipal district levied under proper authorization of the Legislative Assembly, *provided,* That such property is not exempt from taxation by the laws of the United States or by any law enacted by the Legislative Assembly.

(c) Any surcharge of the tax on taxable property of the municipality, * * *.

(d) License taxes provided by Act No. 26 of March 28, 1914, * * * which is hereby declared to be in force;

(e) Fines and costs imposed by peace courts;

(f) Any other impost, excise or tax that may be levied by two-thirds of the members of the municipal assembly, provided the object or matter of taxation is not also the object or matter of any federal or insular tax;

(g) Interest on deposits of funds. * * *.

E. Opinion in Caguas case.

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

SOCIETE ANONYOME DES SUCRERIES DE SAINT JEAN, —vs.— JUAN CALDAS, Commissioner of Finance of the Municipality of Caguas, Porto Rico.	No. 1061 Equity.

OPINION

MUNICIPAL TAXATION.

HAMILTON, J.

The plaintiff operates a sugar central or factory in the municipal district of Caguas, Porto Rico. On January 14, 1920, the municipal assembly of Caguas adopted an ordinance for a special tax for the year 1920 of one per cent on the value in the market on each quintal or hundred pounds of sugar manufactured in any central dedicated to the manufacture of sugar in this municipality, with certain provisions as to how it was to be assessed and collected by the month. The Municipal Commissioner of Finance was authorized to investigate returns made by the central. The fund realized was to be used for paving, preparation and repairs of streets of the city and municipal roads and other work of urgent character. Fine and imprisonment are provided for false reports, violation or delay. The bill in this case filed March 31, 1921, alleges that the plaintiff operates the only factory in this district and that this tax was aimed at plaintiff alone, and that plaintiff already pays a property tax of $1.20% to the Insular Treasury, of which 90% goes to

the municipality of Caguas, and also pays a license tax under the local law of March 28, 1914.

It is alleged that the tax in question is laid by virtue of Section 49 of the Act of Porto Rico, par. F, as follows:

"Any other impost, excise or tax that may be levied by two-thirds of the members of the municipal assembly, provided the object or matter of taxation is not also the object or matter of any Federal or Insular tax."

A restraining order was issued upon this bill and a motion to dismiss has been filed and argued setting up that the bill is without equity. The bill and argument set up a number of supposed defects in the ordinance, and the matter was submitted for decision.

A preliminary question is as to the jurisdiction of this Court to enjoin the collection of taxes. Even where it exists it is a duty which the court looks into narrowly before performance; for taxation is the life blood of a sovereign. It is generally preferable to allow a tax to be levied and collected and then a suit brought to recover it back, for this affects only the persons in question, while an injunction may tie up the whole machinery of government. Nevertheless where a tax offends a constitutional requirement or a provision of the Organic Act, which is the constitution for Porto Rico, the tax is in effect void and no reason is perceived why the tax payer must be put to the necessity of making a payment at all, merely because it is demanded under the veil of official authority. This must be accepted as established law in this court. *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed. 422, 425; *Bouret vs. Benedicto*, P. R. Fed. (Opinion in manuscript, Dec. 22, 1919); *Camunas vs. P. R. Rwy. L. & P. Co.*, (opinion manuscript, March 15, 1921); wherein the Circuit Court of Appeals reversed its decision in the case of *Camunas vs. N. Y. & P. R. S. S. Co.*, 260 Fed. 40, and thus in effect conforming to the decision rendered by the P. R. Federal Court on this point in both cases.

2. Under the Jones Act of March 2, 1917, the People of Porto Rico are given extensive powers, in some respect equal to or even greater than those of a state in the Union although Porto Rico has not been incorporated into the Union. Amongst these powers in that of taxation, to which the only limit affixed is that in Section 2 it is provided "that the rule of taxation in Porto Rico shall be uniform." And Section 3 of the Jones Act provides:

Taxes and assessments on property, internal revenue and license fees, and royalties for franchises, privileges and concessions may be imposed for the purposes of the Insular and Municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico.

There can be no question also that a state or other sovereign, including Porto Rico, may delegate to municipalities the right of taxation, subject to the provisions of the Constitution or of the Organic Act. The people of Porto Rico have delegated such power to municipalities by different laws in the past, as in the act found in Compilation of Porto Rico, 1911, Sec. 1869, being Sec. 70 of the municipal law of 1906.

3. The World War gave a great extension to the law of taxation, many subjects being covered which before had never been dreamed of. The old classification of taxation into property, license, and excise tax would seem still to be controlling. The local municipal law grants to municipalities the right to levy certain occupation taxes, which have already been paid by the plaintiff. So that it would seem that the tax now complained of in order to be valid must be an excise tax. Otherwise it would be an object or matter of taxation already the object or matter of Federal or Insular tax, and therefore not within the scope of municipal powers under Section 49 of the Municipal Act of July 31st, 1919. Wide scope has been given to the subject of excise taxes. What has been said of an occupation tax applies to taxation in gen

eral, that it knows no limit other than the necessity of the public treasury, and the discretion within the constitutional limits of the taxing power. 4 *Dillon, Municipal Corporations,* 2463.

The definition of an excise tax gives an idea of its nature, that is to say, it is something cut off from the price paid on the sale of goods as a contribution to the support of government. 19 Ruling Case Law, 947, Sec. 246. The tax in question may have been intended as an excise tax, because it is imposed upon the proceeds of sales, although it is a matter of convenience collected afterwards by the month. Suppose this to be true, nevertheless under the Organic Act all taxes in Porto Rico must be uniform. If the municipality has the right to lay a tax of 1% it has the right to lay a tax of a larger percentage, for, as Chief Justice Marshall says, the right to tax is the right to destroy. In this case the complaint is not as to the percentage. That may for present purposes be conceded to be reasonable. The question is whether it is uniform. It was conceded on the argument that several municipalities have laid such a tax, but it follows that a great many have not laid such a tax. So that the result at present is that the tax is not uniform, because it is laid by different municipalities, having different needs, and different ideas on the subject of taxation. The result, therefore, is that so far as the plaintiff is concerned taxation is not uniform because of the tax in question, whether it be called license, occupation or property tax. This offends the requirement of the Jones Act as to uniformity. If the legislature has the right to delegate this kind of taxation to municipalities, it must see that the right is uniformly exercised. Otherwise it is putting one enterprise at a disadvantage as compared with another, and thus offending the requirement as to uniformity.

4. It is conceded that the taxation in question was laid under section 49 (f) of the Municipal Law, which

allows local taxation to be levied provided that the object or matter is not also the object or matter of Federal or Insular Tax. This is a new provision in the Municipal Law and does not occur in previous municipal laws. Can it be sustained?

There is no doubt of the principle that a sovereign can delegate to municipalities the right of taxation, within certain limits. This is contained in the Jones Act, Sec. 3 applying to Insular and Municipal governments, but distinctly providing that such taxes respectively "may be provided and defined by the legislature of Porto Rico." The tax in question is not provided and defined by the legislature. On the contrary it was devised by the local authorities of Caguas, and has occurred so far only to a few other municipalities in Porto Rico. It is an extension of local self-government to local taxation for the benefit of municipalities. This is not the plan of the Jones Act. The Spanish method of government was a strong central government, absolute by controlling all local affairs. It is quite true that the American theory is otherwise, but in gradually introducing American institutions into Porto Rico and gradually adapting the people of Porto Rico to American institutions it has seemed wise to confer more power upon the Insular government than has generally been the case in the States. As to taxation, therefore, it is provided that the legislature fix the subjects, object and methods of taxation for all purposes, everything going into the Insular treasury and being when paid divided in certain proportions between the Insular and local treasuries. That would seem to be the reason why it is declared that taxation shall be provided and defined by the legislature of Porto Rico. It would appear to be a very wise provision, designed to meet exactly the conditions which might arise, and the conditions which have in fact arisen in the case at bar and in other municipalities. It would seem that the legislature cannot under the Jones Act delegate to local municipal

councils the taxing power which is expressed in this Sec. 49 (f).

5. The point is raised that the tax in question is a violation of interstate commerce in that the sugar is sold in New York and not in Caguas. The point does not seem to be well taken. Interstate commerce affects all property when it gets in transit, but in order to be an object of interstate commerce the goods in question must start on their interstate journey. The fact that an article is manufactured for the purpose of being shipped to another state does not make it a subject of interstate commerce. It is subject to all local police and tax regulations until it starts on its journey. The exact line which determined this it is sometimes difficult to fix; but the manufacture of sugar and its storing in the factory certainly do not pass over the line and make the sugar a subject of interstate commerce. When it is within the reach of a steamer's tackle it has so started, as was determined by this court in the *Porto Rico Tobacco Co.* case. Whether this may not also be true when it is loaded on trucks for the purpose of transportation to the wharf need not be decided. The case at bar is of sugar still within the factory, if it is to be regarded as affecting the sugar at all, and not as an excise tax. *Gray, Limitation of Taxing Power*, 474, Sec. 938; 17 *Am. & Eng. Ency. of Law*, 70; *Coe vs. Errol*, 116 U. S. 517. Taxation of any kind is apt to affect interstate commerce, and so a more accurate limitation must be drawn, and that limitation is delivery of the goods to the journey. Manufacture belongs to the internal carrier or otherwise starting on the interstate economy of a state. Commerce succeeds manufacture and is not a part of it. *U. S. vs. Knight Co.*, 156 U. S., 1.

6. Other defects are claimed in regard to this tax. Thus it is claimed that the municipality cannot compel the tax payer to become the collector of the municipality

tax, as is required when the municipality is to retain from its *colonos* the amount due under this ordinance upon their sugars in the hands of the central. That this is vexatious and gives rise to misunderstandings between the factory and its patrons, is probable. It would seem, however, to be a question of fact which may need proof. The principle of paying taxation at the source was largely adopted during the World War and cannot be said to be wrong in principle. It is nevertheless true that a municipal corporation does not have all the powers of a sovereign and municipal ordinances may be declared void when unreasonable. This particular point may be left to the proof.

It is difficult to discuss the question on motion to dismiss without discussing at the same time the main equities of the bill, nor is it necessary to draw a distinct line between the two. Without discussing all the points, it would seem that the bill presents a number of grounds which give jurisdiction to this court, and for that reason the motion to dismiss must be denied.

It is so ordered.

Peter J. Hamilton, Judge.

San Juan, P. R.,
April 23, 1921.